IN THE

# Supreme Court of the United States

**October Term, 1949**

**No. 25**

ELMER W. HENDERSON,

*Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE SOUTHERN RAILWAY COMPANY,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

## MOTION AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*.

ROBERT L. CARTER,
THURGOOD MARSHALL,
*Counsel for the National Association for the Advancement of Colored People.*

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The undersigned, as counsel for the National Association for the Advancement of Colored People, respectfully move this Honorable Court for permission to file the accompanying brief as *amicus curiae.* Permission has been secured from all parties with the exception of the intervening respondents, the Southern Railway Company, which has refused its consent. (The letters in answer to our request have been filed in the Clerk's office.)

The National Association for the Advancement of Colored People for the past 40 years has devoted itself to the eradication of discrimination based on race and color from all phases of American life. We are dedicated to the belief that enforced racial separation is an ugly blot on American democracy and, consequently, saps it of much of its integrity. Our democracy is strong, not only because of its material wealth, but because the concept of equality and freedom for all has fired the hopes and aspirations of the people of the world. In practice, however, we have fallen far short of our preachments and we, as well as the rest of the world, have become increasingly aware of this fact. Either we must put our own credo into practice, or we must admit that we cannot successfully make these beliefs a part of our everyday life.

From time to time issues are presented to this Court which require that this "American dilemma" be honestly resolved. This is just such an occasion. It is our belief that the racial distinctions and discriminations which the Southern Railway Company is now attempting to enforce under its present regulations, and which the Interstate Commerce Commission and United States District Court approved, are invalid, humiliating to passengers both white and Negroes alike, and directly contrary to the ideals of democratic living to which this country is dedicated.

Robert L. Carter

Thurgood Marshall

*Counsel for the National Association for the Advancement of Colored People.*

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## BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE.*

### The Opinions Below.

The first report of the Interstate Commerce Commission (R. 184) is reported in 258 I. C. C. 413. The second report (R. 4) may be found in 269 I. C. C. 73. The first opinion by the three judge District Court (R. 63) can be found in 63 F. Sup. 906, and its later opinion from which this appeal is taken (R. 248) is reported in 80 F. Sup. 32.

### Jurisdiction.

The jurisdiction of this Court to review on direct appeal the judgment entered in this case is granted under Title 28 United States Code, Section 1253. Appellant's appeal was filed on November 17, 1948, and probable jurisdiction was noted by this Court on March 14, 1949 (R. 266, 269, 278).

## Statutes Involved.

Section 3, Subsection 1 of the Interstate Commerce Act makes it unlawful for any carrier subject to the provisions of the Act to make or to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[1]

Section 1, Subsection 5 makes it unlawful for any carrier to make an unjust and unreasonable charge for services rendered.[2]

## Statement of the Case.

Appellant, a Negro, on May 17, 1942, was a Pullman passenger on a train of the Southern Railway Company on a trip from Washington, D. C., to Birmingham, Alabama, as a field representative of the President's Committee on Fair Employment Practices. During the course of the

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[1] "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[2] "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: And provided further, That nothing in this chapter shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

journey, appellant had occasion to seek services in the dining car. At that time, the Southern Railway Company, pursuant to a regulation, issued on July 3, 1941 and a supplemental one issued on August 6, 1942, reserved two tables at the end of the diner, adjoining the kitchen, for Negro passengers for a certain time after the diner opened. If no Negroes presented themselves during that period, white passengers were then seated at these tables, and no Negro passenger could thereafter be served until both tables were no longer occupied by whites. Under no circumstances were Negroes permitted to eat at any of the other tables in the diner. If Negroes came to the diner while both of these two tables were empty, they were seated and curtains were drawn to separate them from the rest of the car until they had completed their meal.

When appellant sought service, the two end tables were then occupied by whites, and he was told that he could not be served but would have to return later. There was, at that time, available space at both tables and at other tables in the diner. There is no question but that had appellant been a white passenger he would then and there have been seated and served. When appellant returned to the diner for the second time, the two end tables were still in use, and the dining car steward informed him that he would send word back to his Pullman seat when he could be served. The steward failed to do this, and the diner was taken off in Greensboro, North Carolina, without appellant having been served at all.

A complaint was then filed with the Interstate Commerce Commission alleging unequal treatment and unjust prejudice and discrimination (R. 80). The Commission found the allegations of the complaint had been sustained, but concluded that a future order would serve no useful purpose and, therefore, dismissed the complaint (R. 184, 195). On

suit to set aside the Commission's order the District of Maryland set aside the order of the Commission on the ground that the regulations did not afford the equality of treatment which the Interstate Commerce Act required (R. 63).

Thereupon, the Southern Railway published a new regulation under which one table is reserved exclusively for Negro passengers at the kitchen end of the diner and will be set off by a wooden partition of approximately five feet in height (R. 223). The Commission, with two members dissenting in part, found that this new regulation provided the equality of treatment which the Interstate Commerce Act required and dismissed the complaint (R. 4-11). The Court below affirmed in a two to one decision, and thereupon appellant sought review in this Court.

## Summary of Argument.

The regulation which has been approved as giving to Negro passengers equal treatment required under statutory and constitutional provisions is both discriminatory and unreasonable. Race alone is the basis for its existence. The regulation requires governmental approval. The approval of the regulation by the Interstate Commerce Commission is invalid on constitutional and statutory grounds.

What the carrier contends is that as a result of a survey, it has found that the division of its diners among its white and Negro patrons as provided under its regulation affords the Negro an equitable amount of space. However, the Constitution and the Interstate Commerce Act require that equal treatment be afforded the individual, and whenever a Negro passenger is forced to remain standing when he would have been served had he been white, his right to equal protection has been invaded. Moreover, every pas-

senger is entitled to equal treatment without governmentally-enforced racial segregation.

The carrier must, under the present regulation, determine what it means by the term Negro. The term is subject to varying conflicting statutory definitions, and would subject interstate commerce to the same confusion and burdens which caused this Court to hold state segregation statutes burdensome to interstate commerce in the *Morgan* case. Further, there is less reason for permitting the carrier to make racial distinctions than there is for permitting the states to do so.

The Interstate Commerce Commission sanctioned the regulation and thereby gave to it government support. Our national government is not permitted to make race or color the basis for its action. Governmentally-enforced racial segregation serves no useful purpose. The "separate but equal" doctrine has never provided the equality required by the Constitution. The requirement that Negro passengers, solely because of race, must be confined behind a wooden partition from all other passengers in and of itself is unequal treatment. Our Constitution prohibits such governmentally-enforced segregation.

## ARGUMENT.

### I.

### The present regulation violates the Interstate Commerce Act.

The present regulation sets aside a table for the exclusive occupancy of Negroes at the kitchen end of the dining car while the train is going through those states where segregation is required. From Washington to New York,

Negroes may be served on the same basis as any other passenger. If this regulation is upheld, the Southern Railway Company will install on all of its trains a wooden partition approximately five feet in height which will separate this table and its Negro diners from the rest of the tables and white passengers in the car.[3] Negro passengers, regardless of their number, are required to eat at this table. The rest of the diner is reserved exclusively for whites. This arrangement was made pursuant to a purported survey which showed Negroes to be approximately 3.48 percent of the persons using the diner of the Southern Railway. (See Exhibits, R. 225-247.)

Since respondent's position holds that the present regulation adequately protects Negroes against future discrimination in dining car service, it is very relevant to determine whether the new regulation will insure that the rights of Negro passengers protected by the Interstate Commerce Act will be safeguarded in all circumstances which may

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[3] "Transportation Department Circular No. 142. Cancelling instruction on this subject, dated July 3, 1941, and August 6, 1942. SUBJECT: Segregation of White and Colored Passengers in Dining Cars. To: Passenger Conductors and Dining Car Stewards. Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows: (1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the din shall be reserved exclusively for white passengers. (2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal. (3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules. (4) These rules become effective March 1, 1946. R. K. McClain, Assistant Vice-President."

present themselves in the future.[4] Demonstration of the inadequacy of the present regulation in any situation assures the conclusion that its sufficiency fails to meet the requirements of the Interstate Commerce Act. The present regulation, therefore, must be tested in the light of any and all reasonably foreseeable situations.[5]

The fundamental right to equality of treatment is a right specifically safeguarded by the Fourteenth Amendment to the Constitution of the United States,[6] against the carrier acting pursuant to state laws, and against the carrier acting pursuant to privately promulgated regulations by the express provisions of the Interstate Commerce Act.[7] The right of a Negro passenger guaranteed by these provisions is the right to be served according to the same rules governing all other passengers, a right accruing upon the purchase of the ticket. Where a Negro passenger applies for service and is denied the same at a time when there is a seat available, and is forced to remain standing while a white passenger who subsequently applies is admitted to and served in the same seat denied the Negro passenger, it is clear that the Negro passenger has, on account of his color, been subjected to a disability not suffered by white passengers, and a violation of the Act is patent.

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[4] It is to be noted that there has been no showing of a factual basis demonstrative of the equality claimed to be afforded by the present regulation. The division is based upon a survey made from May 14-24, 1945, and October 1-10, 1946, showing the number of Negroes and whites using the dining car facilities of the Southern Railway (R. 225-247). While this gives some idea as to the approximate volume of Negro patronage in the dining car, there are no means available for determining how many Negro passengers will request service on a particular trip, and the present regulation is insufficient to accommodate an unanticipated volume of Negro traffic.

[5] See first opinion of lower court in this case (R. 76).

[6] *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151.

[7] *Mitchell* v. *United States*, 313 U. S. 80.

Yet, this is what is accomplished under the present regulation as applied to a situation which may be reasonably expected to occur. Where Station 1 is fully occupied by Negro passengers, and Station 2 is wholly or partially occupied by white passengers, a Negro passenger then applying for service is forced to wait, irrespective of the number of vacant seats in the white section. A white passenger presenting himself for service, immediately after the refusal of the Negro passenger, is served without delay.

Nor is it an answer to say that whites also have to wait for seats on some occasions.[7a] The inquiry does not stop at the situation where all seats in the dining car are taken, or where both Negro and white passengers are standing; the character of the right possessed by the Negro passenger who stands while all whites are seated, and while there is space for him in the "white" section, clearly makes the difference.[8] Equal protection is not met by saying to the Negro passenger applying for accommodations in a sleeper,

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[7a] Equality of treatment is not granted because there is between whites and Negroes an "indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

[8] "We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic'. But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws—not merely a group of individuals or a body of persons according to their numbers. And the Interstate Commerce Act expressly extends its prohibitions to the subjecting of 'any particular person' to unreasonable discriminations." *Mitchell* v. *United States*, *supra*, at page 97.

at a time when such accommodations are available to whites, that he may travel tomorrow;[9] nor is it accomplished by telling the Negro student who seeks a legal education, at a time when such facilities are immediately available to whites, that he may study later.[10] The conclusion seems inescapable that the right to dining car service must be afforded when the passenger presents himself, if facilities for affording service are then available anywhere in the car.

Appellant is entitled to and seeks a guarantee of the same service in every respect which is accorded white passengers under like conditions. This includes, among other things, the right to receive the same service and to be served as expeditiously.[11] Earlier regulations of the Southern Railway fell short of affording this needed protection, and it is believed that the inadequacy of present regulations is equally clear.

A review of the history of regulations of the carrier as to dining car service for Negro passengers demonstrates the discrimination which has inevitably accompanied its segregation policies. First in point is its practice of many years' duration of serving meals to passengers of different races at different times, Negro passengers being served either before or after the service of white passengers was completed (R. 186). The fact that the period required for the service of white passengers extended into the next meal period, completely obliterated all possibilities of service of Negro passengers and finally forced modification of this practice as accomplished by its regulation of July 3, 1941, which in turn was found lacking by the Commission and the

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[9] *Mitchell* v. *United States*, *supra*, at page 97.

[10] *Sipuel* v. *Board of Regents*, 332 U. S. 631.

[11] *McCabe* v. *Atchison T. & S. F. Ry. Co.*, *supra*; *Mitchell* v. *United States*, *supra*.

District Court.[12] The supplemental regulation of August 6, 1942, in force at the time appellant was refused service met the same fate in court.[13] Experience as to the regulations of the carrier demonstrates that only by a wide and radical departure from its practices pursuant to its previous regulations will illegal discriminations be avoided. It is apparent, however, that no such change is sought to be accomplished by the regulation under inquiry. The inadequacy of the regulation under consideration becomes more apparent when examined in light of its inflexible character, even though there is a variance in the number of Negro passengers travelling on a given train or seeking service in a particular diner. No matter how many Negro passengers seek or desire service in the dining car, no matter whether they seek service singly, in couples or in larger

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[12] Dining Car Regulations at R. 186: "Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartment set aside for them." As to this regulation the lower court said at R. 78: "The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car."

[13] Dining Car Regulations at R. 186: "On August 6, 1942, these instructions were supplemented as follows: Effective at once please be governed by the following with respect to the race separation curtains in the dining cars: Before starting each meal pull the curtains to service position and place a 'Reserved' card on each of the two tables behind the curtains. These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables. After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated. 'Reserved' cards are being supplied you." This regulation was also found inadequate by the lower court (R. 63).

groups, under respondent's present regulation the same disposition must be made in each instance. They must wait until there is room at the single table for four reserved exclusively for their benefit behind the wooden partition. In each of these situations it appears that the number of seats then available in the white section is immaterial since under no circumstances will the overflow demand of Negro passengers waiting for dining car service be taken care of except at the table for four.

Such situations will, in the very nature of things, constantly present themselves, and their proposed disposition by respondents is intolerable. Incessant delays in obtaining a seat at this one table are inevitable, and for many Negroes the procuring of a seat will be impossible. For those who are fortunate enough to obtain a seat, there will remain the consequent lack of expediency in service. The exercise of the privilege of dining with one's friends, a matter of course among whites, becomes for the Negro an extraordinary accomplishment. When the seats reserved exclusively for Negroes are in use and seats reserved for whites are empty, it is clear that a Negro seeking service in respondent's diner, on being denied such service at one of the empty seats, has been afforded discriminatory treatment on the basis of race and color in violation of the Interstate Commerce Act.[14]

The best that can be said for this regulation is that it is based on a very limited survey indicating the habits of a racial group made with respect to the use of the dining car service. However, the Interstate Commerce Act and the Constitution secures and protects individual rights, and where an individual is discriminated against the Act and the Constitution is violated regardless of how accurate or

[14] See *Mitchell* v. *United States*, *supra*.

exact may be the arrangement regarding the group with which he is identified. We believe that the carrier's past regulations show that the equal treatment to individual passengers which the Interstate Commerce Act requires, cannot be secured except under an arrangement whereby all passengers, regardless of race and color, have the same accommodations, service and treatment available. The only rule governing the availability of accommodations should be the democratic rule of "first come—first served" rather than consideration of race and color.

When appellant bought his ticket for a journey over the Southern Railway between Washington, D. C., and Birmingham, Alabama, in addition to his seat and berth in a Pullman car, he was entitled to all other services and accommodations incident thereto, including the right to dine in the carrier's diner. The record shows that pursuant to regulations then in force, appellant was not permitted to eat in the dining car because of his race and color. White persons, on the other hand, paying the same charges and fare, were permitted to dine in the diner as a matter of course. It is now not disputed that appellant was subjected to an undue preference and prejudice proscribed under Section 3 of the Interstate Commerce Act. The further conclusion is equally inescapable that white persons received greater service, comfort and convenience than appellant and other Negro passengers, paying the same charges and fare and entitled in all respects to like accommodations, comforts and conveniences. Clearly this is a basis for inquiry concerning the reasonableness of the fare exacted as required under Section 1. Further there can be no doubt that appellant and other Negro passengers were receiving less service and comfort than whites paying the same fare and were therefore being charged greater compensation for the transportation than were white passengers.

Under the new regulation which was the subject of further hearing before the Interstate Commerce Commission, these violations have not been cured as indicated, *supra*. Appellant and other Negro passengers who are using, or who in the future will use, respondent's train are and will be subjected to undue prejudice and disadvantage, will receive less service, comfort and convenience than white persons paying the same fare. Appellant contends that this disproportion amounts, and will amount, to a violation of Section 1 (5) as well as Section 3 of the Act.

## II.

**The present regulation constitutes a burden on interstate commerce in the same manner and to the same extent as the state statute which was struck down in *Morgan* versus *Virginia*.**

The same factors which influenced this Court in declaring that the states are without authority to require the separation of races in interstate commerce are at work with equal force when the effect of a carrier regulation enforcing such segregation is considered. In *Morgan* v. *Virginia*,[15] this Court found that one of the main vices of giving effect to local statutes enforcing segregation in interstate commerce was the difficulty of identification.[16] That difficulty is no less when the separation is attempted under a carrier regulation rather than under a state statute.

The carrier in order to enforce the present regulation must define what is meant by the term "Negro" or "colored" person. Appellant, in the instant case, travelled through five states, Virginia, North Carolina, South Caro-

[15] 328 U. S. 373.
[16] *Ibid* at pages 382, 383.

lina, Georgia and Alabama en route to his destination, Birmingham. In Virginia, Georgia and Alabama the term "Negro" or "colored" person includes all persons with any ascertainable amount of Negro blood.[17] In North Carolina this term embraces all persons with Negro blood to the third generation inclusive,[18] whereas in South Carolina 1/8 or more of Negro blood is enough to classify one as a "Negro" or "colored person".[19]

If, therefore, the carrier attempts to enforce the proposed regulation in accord with state policy, it will have to adopt the definitions of all states along the route over which the suggested regulation is to operate.

The record does not show that the carrier here involved has at any time attempted to formulate a definition or test by the application of which a passenger may be determined as a white person or Negro within the meaning of the regulation in question. But even if this were so, the situation would not be helped. The carrier regulations would

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[17] Ga. Laws, 1927, page 272; Ga. Code (Michie Supp.) 1928, Sec. 2177; Va. Code (Michie) 1942, Sec. 67; Ala. Code, 1940, Title 1, Sec. 2 and Title 14, Sec. 360.

[18] N. C. Gen. Stat. 1943, Secs. 51-3 and 14-181 (marriage law); but see N. C. Gen. Stat. 1943, Sec. 115-2 (separate school law) for a different definition of the term.

[19] S. C. Const., Art. III, Sec. 33 (intermarriage). If the trip were continued to New Orleans, Louisiana, the rule is not clear. It was first held that all persons, including Indians, who were not white were "colored". *Adelle* v. *Beaugard*, 1 Mart. 183. In 1910 it was held that anyone having an appreciable portion of Negro blood was a member of the colored race within the meaning of the segregation law. *Lee* v. *New Orleans G. N. Ry.*, 125 La. 236, 51 S. 182. In the same year, however, it was decided that an octoroon was not a member of the Negro or black race within the meaning of the concubinage law (La. Act, 1908, No. 87). *State* v. *Treadaway*, 126 La. 300, 52 So. 500. Shortly after the latter decision, the present concubinage statute was enacted substituting the word "colored" for "Negro". La. Acts, 1910, No. 206, La. Crim. Code (Dart), 1932, Arts. 1128-1130. The effect of the change is yet to be determined.

necessarily be even less precise in this regard than a state segregation statute. It is also perfectly clear that, as between different carriers and their respective segregation regulations, there are bound to be a multiplicity of variations of definitions of passengers as white and colored, and a multiplicity of variations in the ascertainment of passengers as white and colored. The dining car steward makes the determination as to the race of a passenger who seeks to dine in his car, and as between different stewards there is bound to be variations in the enforcement of the regulation. One steward might consider a passenger a white person and another steward might consider the same passenger a Negro within the meaning of the regulation. One thing is clear, whether the carrier follows the state definitions or adopts its own, it makes itself subject to burdensome litigation.[20] Hence, it is clear that the proposed regulation is as objectionable and as burdensome to commerce as the Virginia statute voided in the *Morgan* case.

There is, moreover, even less reason for giving effect to a carrier regulation than to a state statute. None of the factors which are said to give validity to a legislative judgment which is expressed in segregation laws are operative where carrier regulations are involved. If respondent fears, as suggested before the Interstate Commerce Commission and in the lower court, that the co-mingling of Negro and white passengers will result in breaches of the peace, there is no reason advanced to show that the states along respondent's route are without power to handle or control

[20] See *Louisville & N. R. R.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411 (1912); *Missouri K. & T. Ry. Co. of Texas* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago R. I. & P. Ry. Co.* v. *Allison*, 210 Ark. 54, 178 S. W. 401 (1915) where punitive damages were afforded white persons for mistaken placement in colored coaches. Regardless of the definition used the carrier will be liable in damages unless its definition is a correct one as determined by the law of the applicable forum.

such incidents and to protect respondent's property.[20a] National interests in maintaining commerce free of burdens and obstructions, must prevail over carrier regulations as well as state statutes. Hence under the rationale of the *Morgan* case, it must logically follow that neither a state nor a carrier has authority to burden interstate commerce by the enforced segregation of passengers in interstate commerce.

## III.

**Sanction of this regulation by the Interstate Commerce Commission constitutes governmental action within the reach of the Fifth Amendment.**

With the passage of the Interstate Commerce Act, the Congress established the Interstate Commerce Commission to exercise its authority with respect to interstate commerce within the terms of the statute.

Under Section 1 (13) the Commission is authorized by general or special orders to require all carriers by railroad subject to the provisions of the Act to file from time to time their rules and regulations with respect to car service, and the Commission may in its discretion direct that such rules and regulations be incorporated in their schedules showing

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[20a] Nor may we add is there any reason to anticipate trouble. The Southern Railway is no local carrier but operates over one of the main arteries of travel connecting the North and South. People from states having civil rights statutes as well as those from states which practice segregation use its facilities. Negro passengers, at least since *Mitchell* v. *United States*, *supra*, have used its Pullman facilities without segregation and without any infractions of the law taking place. Service in its diner without segregation will not force any white person who does not desire to sit down and eat with a Negro.

rates, fares, and charges for transportation and be subject to any and all provisions of this chapter relating thereto.[21]

The Commission is further authorized under Section 1 (14) after hearing a complaint or on its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car services by carriers by railroads subject to this chapter.[22]

Under Section 3 (1) Congress has declared it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person.

Under Section 1 (5) the carriers subject to the Act are required to charge reasonable and just rates for services. The Commission has the authority and the duty of seeing to it that these provisions are carried out, and it may determine on its own initiative or on the complaint of an individual party whether a purported regulation or a regulation in force is in keeping with the requirements of the Act.

From the decisions of this Court, it is clear that Congress intended to reach all forms of discriminatory practices made by carriers subject to the Interstate Commerce

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[21] Sec. 1 (13) provides—Rules and regulations as to car service to be filed, etc.—The commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto.

[22] Sec. 1 (14) provides—Establishment by commission of rules, etc. as to car service.—The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices.

Act.[23] Regarding such practices, it is clear that discrimination because of race and color is prohibited. There is no question but that Congress has therefore occupied the field and that private or state regulations contrary to the congressional purpose must fall.[24]

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[23] *Mitchell* v. *United States*, *supra*, at pages 96, 97.

[24] This has been the rule since *Gibbons* v. *Ogden*, 9 Wheat 1. In this connection it seems important to note that while this Court on occasion has questioned certain of its own earlier distinctions between direct and indirect impositions, the fact that exercise of control over interstate commerce is the purpose and objective of a questioned state statute, and that its enforcement is achieved by interference with interstate movement itself, militates strongly against the validity of the statute. This is because such an impact necessarily involves some invasion of the national interest in maintaining the freedom of commerce across state lines. If this fact alone is not conclusive, it at least suffice to establish the impropriety of the state regulation until and unless it is shown that urgent considerations of local welfare take a particular case out of the general rule. See *Pennsylvania* v. *West Virginia*, 262 U. S. 553, especially 596, 597; *Bob Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, follows the same rationale. There it was felt that commerce was so peculiarly local that there could in no respect be an interference with the control of the United States over foreign commerce. Further, this conclusion seemed to be reached by virtue of the fact that the Michigan statute and public policy was found by the court to conform to the national policy with regard to barring distinctions and classifications based on race and color. On this point the Court said in note 16: "Federal legislation had indicated a national policy against racial discrimination in the requirement, not urged here to be specifically applicable in this case, of the Interstate Commerce Act that carriers subject to its provisions provide equal facilities for all passengers, 49 U. S. C. A. Sec. 3 (1), 10A, F. C. A. title 49, Sec. 3 (1), extended to carriers by water and air, 46 U. S. C. A. Sec. 815, 10 F. C. A. title 46, Sec. 815; 49 U. S. C. A. Secs. 484, 905, 10A F. C. A. title 49, Secs. 484, 905. Cf. *Mitchell* v. *United States*, 313 U. S. 80, 85 L. ed. 1201, 61 S. Ct. 873. Federal legislation also compels a collective bargaining agent to represent all employees in the bargaining unit without discrimination because of race. 45 U. S. C. A. Secs. 151, *et seq.*, 10A F. C. A. title 45, Secs. 151, *et seq.*; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226; *Tunstall* v. *Brotherhood of Locomotive F. E.*, 323 U. S. 210, 89 L. ed. 187, 65 S. Ct. 235. The direction of national policy is clearly in accord with Michigan policy. Cf. also *Hirabayashi* v. *United States*, 320 U. S. 81 L. ed. 1774, 63 S. Ct. 1375; *Korematsu* v. *United States*, 323 U. S. 214, 89 L. ed. 194, 65 S. Ct. 193; *Ex parte Endo*, 323 U. S. 283, 89 L. ed. 243, 65 S. Ct. 208."

The situation which was present when *Hall* v. *DeCuir* was decided is present no longer.[25] There it was felt that state statutes that required equal treatment of passengers in interstate commerce were burdensome on such commerce and that private carriers were free to make their own rules and regulations until such time as Congress had spoken. Congress has now spoken.

It is the duty of the Commission to say whether a regulation provides equality of treatment, and the carrier regulations dealing with this subject matter are of no force or effect without the sanction of the Commission. They can only exist with the sanction of the government. In this case, the Commission specifically approves the present regulation and this is clearly governmental action within the meaning of the Fifth Amendment.[26]

## IV.

**The government is powerless under the Constitution to make, sanction, or enforce, any distinctions or classifications based upon race or color.**

It has been the consistent opinion of this Court that the Constitution requires that all persons similarly situated be treated in a like manner.[27] Thus, where legal distinctions

[25] 95 U. S. 485.

[26] For full discussion of the concept of state action under the Fourteenth Amendment see *United States* v. *Screws*, 325 U. S. 91, and particularly Mr. Justice RUTLEDGE's opinion at pages 113, 114, 115. It is clear the same principle will determine whether there is governmental action under the Fifth Amendment. This issue was raised in *Hurd* v. *Hodge*, 332 U. S. 24, but not decided because the court disposed of the problem without reaching the constitutional question.

[27] See *Truax* v. *Corrigan*, 257 U. S. 312; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Takahashi* v. *Fish and Game Commission*, 332 U. S. 410; *Shelley* v. *Kraemer*, 334 U. S. 1; *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; See also *Hurd* v. *Hodge*, 334 U. S. 24; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210.

are made as between persons or groups, such distinctions must have a rational basis in order to avoid conflict with either the Fourteenth or Fifteenth Amendments. This Court has consistently held that governmental distinctions between persons based upon race or color are arbitrary and unreasonable and cannot stand under the Constitution.[28] Although the Fifth Amendment contains no equal protection clause, it is no longer open to doubt that the United States government is as limited in making race a basis for a legislative enactment as are the states under the Fourteenth Amendment.[28a] It is also now clear from the decisions of this Court that the government cannot be a party to the enforcement of racial distinctions and classifications which are privately promulgated.[29] Although *Hurd* v. *Hodge* was decided without reaching this constitutional question, it seems certain that this Court will find the federal government bound by the same constitutional limitations which is found applicable to the states in *Shelley* v. *Kraemer*.

Only under the rationale of *Plessy* v. *Ferguson*[30] could a contrary decision be reached. That decision gave birth to the much criticized "equal but separate" doctrine, under which enforced racial separation is declared permissible as long as the facilities available for Negroes are equal or

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[28] See cases *supra*, in note 27.

[28a] *Hirabayashi* v. *United States*, *supra*; *Korematsu* v. *United States*, *supra*; and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, *supra*.

[29] *Shelley* v. *Kraemer*, 334 U. S. 1.

[30] 163 U. S. 537.

substantially equal to those available to whites.[31] Of course there can be no question of equal facilities in this case when under the carrier's present regulations a passenger who is a Negro is forced to eat in isolation behind a wooden barrier as if he were unclean or an untouchable.[32] But for more

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[31] *The Report of the President's Committee on Civil Rights* at page 81. "This judicial legalization of segregation was not accomplished without protest. Justice Harlan, a Kentuckian, in one of the most vigorous and forthright dissenting opinions in Supreme Court history, denounced his colleagues for the manner in which they interpreted away the substance of the Thirteenth and Fourteenth Amendments. In his dissent in the *Plessy* case, he said: 'Our Constitution is color blind, and neither knows nor tolerates classes among citizens. * * * ' 'We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of 'equal' accommodations * * * will not mislead anyone, or atone for the wrong this day done. *If evidence beyond that of dispassionate reason was needed to justify Justice Harlan's statement, history has provided it.* Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates educational, recreational and other public services, according facilities to the two races which are 'separate but equal'. *In the Committee's opinion this is one of the outstanding myths of American history for it is almost always true that while indeed separate, these facilities are far from equal.*" (Italics supplied.)

[32] *The Report of the President's Committee on Civil Rights* at page 79. "Mention has already been made of the 'separate but equal' policy of the southern states by which Negroes are said to be entitled to the same public service as whites but on a strictly segregated basis. The theory behind this policy is complex. On one hand, it recognizes Negroes as citizens and as intelligent human beings entitled to enjoy the status accorded the individual in our American heritage of freedom. It theoretically gives them access to all the rights, privileges, and services of a civilized, democratic society. *On the other hand, it brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people.*" (Italics supplied.)

than 20 years this Court has shown an acute awareness of the dangers and fallacies in *ratio decedendi* of *Plessy* v. *Ferguson* and has moved further away from the philosophy which that case expounded. There is now little doubt but that government cannot now use race or color as a permissible basis for legislative or administrative action. Constitutional limitations in this regard are probably more stringent and inflexible when the national government is involved than when there is a question of permissible state action. The "equal but separate" doctrine should be reexamined and discarded.

## Conclusion.

It is respectfully submitted that the judgment of the District Court should be reversed and that the Interstate Commerce Commission should be directed to enter an order prohibiting the railroad from requiring racial segregation of its Negro dining car patrons.

Robert L. Carter

Thurgood Marshall

*Attorneys for Amicus Curiae.*